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THE THEORY OF QUALIFICATIONS AND THE CONFLICT OF LAWS

The differences existing in the rules of the conflict of laws in the various countries has given rise to the question whether the rules of the forum should be interpreted as adopting the foreign law in its totality, including its rules of the conflict of laws, or whether they should be deemed to incorporate only the foreign internal law. This problem is that of *renvoi*.¹ A problem of a different character, though equally fundamental, may arise, even if the rules of the conflict of laws of the countries involved in a given case are alike, because of a difference in the meaning of the concepts used. "Nationality," "domicil," "the law of the place of contracting," "the law of the place of performance," and "the law of the place where the tort was committed" are all legal concepts which may be determined in more than one way. The countries differ also on the question of what constitutes immovable and what movable property, on the meaning of "capacity," "form," "substance," "procedure," and in their definition of various other terms upon which the application of the foreign law depends. The question thus presenting itself is what law is to determine the meaning of the above terms. The problem referred to has given the greatest concern to the continental writers and is generally discussed by them under the title of "theory of qualifications."

Continental Law

From the standpoint of continental theory, the problem of the conflict of qualifications is one of the most difficult problems in the conflict of laws. Let us consider first the principal problems

¹See (1910) 10 Columbia Law Rev. 190, 327; (1918) 27 Yale Law Journal, 509; (1919) 29 *ibid.* 214; (1918) 31 Harvard Law Rev. 523.

involved and thereupon the general theories which have been advanced for the solution of the problem.

Domicil. Domicil plays an important role in the Anglo-American and South American systems of the conflict of laws. On the continent and in a few of the South American countries it has been supplanted by the principle of nationality. The law of domicil is invoked even in these countries, however, when the nationality of the party is unknown and under other circumstances. Suppose now that the question before a New York court is whether a citizen of the State of New York, formerly domiciled therein, has lost his New York domicil and become domiciled in France. Should the New York courts determine the question of domicil solely with reference to their own law or should they inquire into the French law of domicil? The question is of considerable practical importance because of the fact that the continental definition of domicil does not always agree with the Anglo-American. In some countries of Europe domicil denotes merely the center of a man's affairs without the connotation of permanent home.² A similar problem might be presented with reference to England, whose rules governing domicil differ in various respects from the American law, for example, as regards the reverter doctrine and as to the capacity of a married woman to acquire a separate domicil from her husband.

The continental writers maintain with respect to the question the greatest variety of views. Some agree with the French Court of Cassation that the question of domicil involves merely a question of fact and that a conflict with respect to the definition of domicil cannot, therefore, arise.³ Others concede that the notion of domicil is one of law and fact, but assume that the Roman conception of domicil has become the universal rule,

²See Art. 102, French Civil Code; Art. 16, Italian Civil Code. The French call it a *de facto* domicil to distinguish it from a "legal" or "authorized" domicil. The latter is a preliminary step to naturalization and confers upon the foreigner the enjoyment of all civil rights. See Art. 13, Civil Code.

³The French Court of Cassation declines therefore to review the findings of the trial court with respect thereto. Cass. Oct. 22, 1900, Clunet 1900, 964. The lower courts determine the question in accordance with the French notion of domicil if the party resided in France. If the residence was in another state they profess to apply the national law of the party. App. Nancy, May 8, 1875, Sirey 1876, 2, 137; App. Toulouse, May 22, 1880; Sirey 1880, 2, 294. See also App. Brussels, Jan. 18, 1888, Dalloz 1888, 2, 249.

In Germany it has been held by the Imperial Court that the loss of a domicil should be determined with reference to the law of such domicil. Juristische Wochenschrift 1884, 28. See *ibid.*, 1895, 393.

so that there are actually no differences in regard to the question.⁴ Those conceding that the definitions of domicil vary in the different countries reach conclusions which are connected more or less with their general theories concerning the conflict of laws. For example, some authors, supporting the principle of the "personality" of laws, would allow the national law of the party to govern the question.⁵ Weiss⁶ would allow an exception to the rule with respect to countries in which the law of domicil controls status and capacity. In such a case he sees no escape from the application of the law of the forum. Others would refer the decision to the law of the forum in all cases in which the party was a resident of the forum, and in all other cases, to his national law.⁷ Still others maintain that the *lex fori* is the only law that can furnish a solution of the problem in any case.⁸ The German writers determine the question of domicil in accordance with the law of each country in which the party may be deemed domiciled.⁹ If the application of this test should result in several domicils, Niemeyer¹⁰ would choose the one having the closest connection with the question before the court, that is,

⁴Bar, Private International Law (Gillespie's transl.) 112. The Roman definition of domicil is as follows: "Et in eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus; si nihil avocet, unde cum profectus est, peregrinari videtur, quo si rediit, peregrinari iam destitit." Code X, 40, 7.

⁵3 Weiss, *Traité de droit international privé* (2d ed.) 323; Valéry, *Manuel de droit international privé*, 113; Durand, *Essai de droit international privé*, 373.

⁶3 Weiss, *op. cit.*, 323.

⁷1 Contuzzi, 1 codice civile nei rapporti del diritto internazionale privato, 134; Despagne & de Boeck, *Précis de droit international privé* (5th ed.), 501; Vincent & Pénaud, *Dictionnaire de droit international privé*, "Domicile" nos. 2-3.

⁸Kahn, 30 *Jhering's Jahrbücher für die Dogmatik*, 76; Levis, *Das internationale Entmündigungsrecht des deutschen Reichs*, 24.

⁹Neumann, *Internationales Privatrecht*, 51; Niemeyer, *Das internationale Privatrecht des bürgerlichen Gesetzbuchs*, 71; 1 Zitelmann, *Internationales Privatrecht*, 178-179. "To have a domicil in a certain state," says Zitelmann, "signifies therefore . . . in the first place that a person has a domicil in such state according to the law of such state . . . The judge has to find the domicil to be so established irrespective of the principles governing domicil in his own law." 1 Zitelmann, *op. cit.*, 178-179.

¹⁰Das internationale Privatrecht des bürgerlichen Gesetzbuchs, 73. *Accord.* Barazetti, *Das internationale Privatrecht im bürgerlichen Gesetzbuche für das deutsche Reich*, 22; 1 Gierke, *Deutsches Privatrecht*, 220.

generally the older domicil. Zitelmann¹¹ would accept the older domicil if neither of the domicils was in the state of the forum. If one of them was in such state, he would choose that domicil.

Nationality. The law governing the acquisition and loss of nationality varies greatly in the different countries, so that it often happens that a person is claimed as a citizen or subject by several governments.¹² In countries determining the capacity of parties and various other questions in the conflict of laws in accordance with the law of nationality, this condition gives rise to a serious problem. Should the law of a particular country under these circumstances adhere in its system of the conflict of laws to the principle of nationality or should it yield in such a case to that of domicil? If the law of nationality is to be retained, what law is to determine the nationality of the party for the purpose of the litigation?

Where the law of the forum claims the party as a subject this law will naturally control. Courts and writers are agreed upon this point.¹³ But where the party has two foreign nationalities there is the greatest difference of opinion as to the one that should prevail. The only express legislative provision on the subject is to be found in the Japanese Civil Code, which provides that the nationality acquired last is to govern.¹⁴ The French Court of Cassation has applied the provisions of the French Civil Code

¹¹Zitelmann, *op. cit.*, 180. Accord: Habicht, Das internationale Privatrecht nach dem Einführungsgesetze zum bürgerlichen Gesetzbuche, 230; Niedner, Das Einführungsgesetz zum bürgerlichen Gesetzbuche (2nd ed.) 85; Kühlenbeck, Das Einführungsgesetz (Vol. 6 of Staudinger's Kommentar zum bürgerlichen Gesetzbuche) 146. See also Neuman, *op. cit.*, 52. Planck prefers in certain cases the law of the place of residence to that of the older domicil. Bürgerliches Gesetzbuch (3d ed.), Vol. 6, 110.

¹²Bisocchi, Acquisto e perdita della nazionalità nella legislazione comparata e nel diritto internazionale, 112; 1 Sieber, Das Staatsbürgerrecht im internationalen Verkehr 190; 1 Weiss, *op. cit.*, 255.

¹³So expressly Art. 16 of the Japanese Civil Code. In support of this proposition see also Cass. Belge, June 12, 1876, Clunet 1878, 522; App. Toulouse, Jan. 26, 1876, Clunet 1877, 235; Court of First Instance of Luxembourg, Jan. 5, 1887, Clunet 1887, 674; Swiss Federal Tribunal, June 10, 1876, Clunet 1876, 231; Despagnet, *op. cit.*, 369-370; Esperson, Condizione giuridico dello straniero, 560; Habicht, *op. cit.*, 229; Kühlenbeck, *op. cit.*, 145; Niedner, *op. cit.*, 83; Niemeyer, Das internationale Privatrecht des bürgerlichen Gesetzbuchs, 64; Das internationale Privatrecht im Entwurf eines bürgerlichen Gesetzbuchs, 25; 6 Planck, *op. cit.*, 111; Valery, *op. cit.*, 321; Venzi, Foro italiano, 1904, 1, 761-762; 1 Weiss, *op. cit.*, 784; 1 Zitelmann, *op. cit.*, 175.

¹⁴Art. 16, Civil Code. To the same effect Barazetti, *op. cit.*, 22; Niemeyer, Das internationale Privatrecht des bürgerlichen Gesetzbuchs, 64, Vorschläge und Materialien zur Kodifikation des internationalen Privatrechts, 125.

relating to nationality in such a case.¹⁵ The lower courts, however, have sometimes abandoned the principle of nationality in these cases and substituted for it the law of domicil.¹⁶ A number of writers would allow the law of domicil to govern whenever the domicil of the party was in one of the foreign states concerned.¹⁷ Some would do so only if the foreign nationalities were acquired at the same time.¹⁸ If they were acquired in succession some¹⁹ would accept the nationality which was acquired last; others,²⁰ the one that was acquired first. If the party had no domicil in either of the foreign states some authors would accept the nationality of the state in which the party had his residence.²¹ Weiss²² would hold in such a case that he is a subject of the state the law of which presents the closest similarity to that of the forum. Fiore²³ and Planck²⁴ would prefer in this case the nationality based on blood relationship. Esperson²⁵ would do so only if the law of the forum accepted the principle of blood relationship. Wächter²⁶ would apply the *lex fori* in accordance with his general theory concerning the conflict of laws. Bartin²⁷ would leave the judge without any fixed criterion in this case. Valery²⁸ has suggested

¹⁵Cass. June 2, 1908, *Revue de droit international privé*, 1909, 247.

¹⁶App. Aix, July 9, 1903, *Clunet* 1904, 150. To the same effect Bar, *op. cit.*, 205; Kahn, 30 *Jhering's Jahrbücher*, 69; Laurent, *Avant projet de révision du Code Civil*, art. 18, par. 3.

¹⁷Habicht, *op. cit.*, 230; Niedner, *op. cit.*, 84; 1 Weiss, *op. cit.*, 785. See also 6 Planck, *op. cit.*, 111.

¹⁸Barazetti, *op. cit.*, 22; Kühlenbeck, *op. cit.*, 145; Niemeyer, *Das internationale Privatrecht im Entwurf eines bürgerlichen Gesetzbuchs*, 25.

¹⁹Barazetti, *op. cit.*, 22; Habicht, *op. cit.*, 230; Kühlenbeck, *op. cit.*, 145; Niemeyer, *Das internationale Privatrecht des bürgerlichen Gesetzbuchs*, 64; *Vorschläge und Materialien zum Entwurf eines bürgerlichen Gesetzbuchs*, 25.

²⁰1 Zitelmann, *op. cit.*, 176.

²¹Barazetti, *op. cit.*, 22; Niemeyer, *Das internationale Privatrecht im Entwurf eines bürgerlichen Gesetzbuchs*, 25.

²²1 Weiss, *op. cit.*, 785.

²³Fiore, *Le droit internationale privé* (4th ed., Antoine's translation) No. 332.

²⁴6 Planck, *op. cit.*, 112.

²⁵*Op. cit.*, 568. In cases of naturalization Esperson chooses the nationality that corresponds most closely to the *lex fori*. *Op. cit.*, 578.

²⁶24 *Archiv für die civilistische Praxis*, 265.

²⁷*Clunet* 1897, 471; Reprint 39.

²⁸*Op. cit.*, 328.

that the question depends upon the intention of the parties. Venzi²⁹ would allow the plaintiff to prove his nationality in conformity with the law of the State of which he claims to be a subject. Pillet³⁰ would respect the law of the place of birth and also the nationality claimed by virtue of blood relationship. If one party should base his contention upon the *jus soli* and the other upon the *jus sanguinis*, the French judge would be unable, according to Pillet, to proceed with the case until the parties had agreed upon the question of nationality.

Law of the Place of Contracting. Another question involving a "point of contact" of a transaction with the law of a given jurisdiction arises in connection with the law of contracts. Suppose, for example, that A in New York makes an offer to B in Petrograd which the latter accepts by mail. By the law of New York the contract is completed when the letter of acceptance is posted. By the law of Russia³¹ the contract is not completed until the letter of acceptance reaches A. The same situation would be presented if B lived in Belgium,³² Italy,³³ Rumania,³⁴ and certain other countries.³⁵ If a dispute should arise with reference to the contract the

²⁹Foro italiano, 1904, 1, 762.

³⁰L'ordre publique, 89-91.

³¹3 Klibanski, Handbuch des gesammten, rüssischen Zivilrechts, 5.

³²App. Liège, Feb. 15, 1876, Pasicrisie, 1876, 2, 145; Apr. 22, 1885, Pasicrisie, 1885, 2, 335; Clunet 1886, 369; App. Brussels, Dec. 1, 1884, Pasicrisie, 1885, 2, 303; Clunet 1886, 369, Feb. 17, 1905, Revue de droit international privé, 1908, 288; Trib. Com. Louvain, July 26, 1887, Gazette du Palais, 1887, 2, 606; Trib. Com. Bruges, July 28, 1888, Pandectes Périodiques, 1889, 380; Trib. Com. Antwerp, Aug. 27, 1906, Clunet 1909, 235.

³³Art. 36, Commercial Code; Art. 1098, Civil Code; App. Milan, Dec. 11, 1888, Clunet 1892, 512; Cass. Turin, Apr. 26, 1881, Foro italiano, 1881, 1, 620; Jan. 13, 1891, Monitore dei tribunali 1891, 189; La Legge 1891, 1, 519; Clunet 1891, 1026; Cass. Rome, March 23, 1892, Monitore, 1892, 711. See also Giurisprudenza sul codice civile, art. 1098 No. 324 and cases there cited; Giurisprudenza sul codice di commercio, art. 36 and cases there cited. So as to jurisdiction of courts, Cass. Turin. Feb. 9, 1884, Monitore 1884, 268; Oct. 27, 1905, Monitore 1906, 101; App. Milan Dec. 1, 1888, Monitore 1889, 55.

³⁴Com. Code, Arts. 35-38.

³⁵App. Lyons, June 27, 1867, Dalloz 1867, 2, 193; App. Chambéry June 8, 1877, Dalloz 1878, 2, 113; App. Orléans, June 26, 1885, Dalloz 1886, 2, 135; App. Aix, Nov. 23, 1908, Dalloz 1909, 2, 61; Clunet 1909, 746; App. Nimes, June 15, 1900, Dalloz, 1901, 2, 415; March 4, 1908, Dalloz 1908, 2, 248. So as to jurisdiction of courts, App. Bourges, Jan. 19, 1866, Sirey 1866, 2, 218; App. Lyons Apr. 29, 1875, Sirey 1875, 2, 263. The French courts favor more commonly the theory that the contract is made where the letter of acceptance is mailed. App. Pau, July 16, 1852, Dalloz 1854, 2, 205; App. Lyons June 1, 1857, Dalloz 1858, 2, 21; App. Caen, June 15, 1871, Dalloz 1872, 5, 111; March 30, 1889, Gazette du Palais, 1889, 1, 825; App. Douai, March 25, 1886, Dalloz 1888, 2, 37; App. Poitiers Nov. 4, 1886,

answer would depend upon the law governing the contract. Let us assume that both New York and the foreign country are committed to the doctrine that the law of the place of contracting governs. The law of New York says that the contract is made in Russia. The law of Russia says that the place of contracting is New York. Which law is to determine the place of contracting?

Continental writers generally determine the obligation of contracts in accordance with the expressed or implied intention of the parties. The place where the contract is deemed made is, therefore, at most of secondary importance.³⁶ Many writers deny that the rules relating to the completion of contracts by correspondence from the point of view of time can be rationally invoked for the solution of the problem from the standpoint of the conflict of laws. For these reasons the case suggested above is rarely discussed by the authors. Those that have dealt with it have, as a rule, applied the law of the forum.³⁷ Some writers have suggested that the *lex loci* should be determined in accordance with the inten-

Gazette du Palais, 1886, 2, 907; Jan. 21, 1891, Dalloz 1892, 2, 249, May 14, 1901, Dalloz 1902, 2, 12; Oct. 28, 1907, Revue de droit international privé, 1908, 222; App. Rennes, Dec. 15, 1891, Clunet 1892, 912; App. Paris, Feb. 5, 1910, Dalloz 1913, 2, 553. The Court of Cassation regards it as a question of fact. Cass. Aug. 6, 1867, Sirey 1867, 1, 400; Dalloz 1868, 1, 35; Dec. 1, 1875, Dalloz 1877, 1, 450; March 30, 1881, Sirey 1882, 1, 56; Journal du Palais, 1882, 1, 125.

³⁶The following presumptions have been proposed: (1) the common nationality of the parties, Surville, Clunet 1891, 369-370; (2) the common domicile, Pillet, Principes de droit international privé, 441; Cours de droit international privé, 325; 20 Annuaire de l'Institut de droit international privé, 153; (3) the law of the domicile of the debtor, Bar, *op. cit.*, 443-446; (4) the national law of the offeror, Cass. Turin, Jan. 13, 1891, Clunet 1891, 1026. Some would apply the law which would retard the formation of the contract longest, Bartin, Clunet, 1897, 476, Reprint 44-45; Chrétien, Clunet 1891, 1028; Dreyfus, L'acte juridique en droit international privé, 363; others the law of both states, Barazetti, *op. cit.*, 54; Hindenburg, Revue de droit international et de législation comparée, 1897, 263, 285; 2 Zitelmann, *op. cit.*, 164. Surville favors the common domicile in the absence of a common nationality. In the absence of a common nationality and domicile he would apply the *lex domicilii* of the party whose domicile was established in the country to which the other party belonged by nationality. In the absence of any of the above facts he would apply the law of the party who had taken a preponderating part in the negotiations. Clunet 1891, 369-371. The Institute of International Law adopted the following resolution: "If the contract has been concluded by correspondence, the *lex loci contractus* shall not be taken into consideration and the law of the domicile or commercial establishment of the offeror shall be applied." 22 Annuaire de l'Institut de droit international privé, 289-292.

³⁷Despagnet & de Boeck, *op. cit.*, 893; Clunet 1898, 271; 1 Diena, Diritto commerciale internazionale, 476, 479; Kahn, 30 Jhering's Jahrbücher, 99; Surville et Arthuys, Cours élémentaire de droit international privé (6th ed.), 306; Valéry, *op. cit.*, 956; Louis Perez Verdía, Tratado elemental de derecho internacional privado, 188; 4 Weiss, *op. cit.*, 373.

tion of the parties, and, when the intention of the parties is not clear, by the judge in the light of the surrounding circumstances.³⁸

Law of the Place of Performance. According to the law of some countries, including Germany³⁹ and most states of this country,⁴⁰ the obligation of contracts is determined with reference to the law of the place of performance. Where the contract is silent regarding the place of performance such place must necessarily be determined by law. Suppose, now, that A of this country and B of Germany enter into a contract containing no express provision regarding the place of performance and that the American and German laws differ on the question where such place of performance is. If the action is brought in the United States in a state determining the rights and duties arising out of contracts by the law of the place of performance, we should have identical rules of the conflict of laws governing the case in the two countries involved, but a question would be raised regarding the law that should decide the preliminary question or point of contact, that is, what the place of performance is.

The above problem has remained practically unnoticed. Generally the assumption is made that the law of the countries concerned is identical with respect to the place of performance, but this is often erroneous in fact. The suggestion has been made also⁴¹ that the law governing the contract should determine the question, but it is obvious that if the law of the place of performance controls the obligation of the contract in the particular system of the conflict of laws, such suggestion involves a begging of the question at issue. Kahn⁴² points out that in the case under consideration only the law of the forum can furnish a solution of the preliminary problem.

Law of Place Where Tort is Committed. A problem similar to the one just discussed may present itself with respect to torts. The physical act causing the harm may take place in one state or country and the effect or effects resulting therefrom may occur in

³⁸Gemma, *Propedeutica al diritto internazionale privato*,—La cosiddetta teoria delle qualificazioni, 113-114; Niemeyer, *Vorschläge und Materialien zur Kodifikation des internationalen Privatrechts*, 242.

³⁹Imperial Court, Oct. 13, 1894, 34 R G 191; Apr. 28, 1900, 46 R G 193; May 26, 1900, 46 R G 112; Apr. 21, 1902, 51 R G 218; June 16, 1903, 55 R G 105; July 4, 1904, 14 *Zeitschrift für internationales Privat- und Strafrecht*, 285; April 26, 1907, 18 *ibid.*, 177.

⁴⁰Beale, 23 *Harvard Law Rev.* 82, 194.

⁴¹Gemma, *op. cit.*, 115-116.

⁴²Kahn, 30 *Jhering's Jahrbücher*, 99; Dreyfus, *op. cit.*, 308, note 1.

some other state or country or in several other states or countries. Although the law of the various countries concerned should agree upon the *lex loci delicti* as the rule governing torts in the conflict of laws, one of them might regard the place of the physical act as the *lex loci* and another, the place where the effect occurred.⁴³ How is the place where the tort is committed to be ascertained?

Kahn⁴⁴ appears to be the only writer who has considered this problem. As in the preceding cases he finds it necessary to determine the question in accordance with the law of the forum.

Movable or immovable property. The law may regard movable property for certain purposes as immovable property. Rights in realty may be assimilated by law either to immovable or to movable property. Artificial categories may thus be created with respect to which the law of the situs of the property, the law of the state governing the particular juridical relationship, and the law of the forum may differ. The question thus presents itself: What law shall determine the character of the property interest in question?

The statement is generally made that the questions must be determined by the law of the situs of the property.⁴⁵ Some of the leading writers contend, however, that this rule is incorrect and that the law governing the particular juridical relationship should control. According to these writers the law of the situs should govern with respect to property rights as such, but if the question arises in connection with the law of succession, matrimonial property, or contracts, it should be determined by the rule applicable in the conflict of laws to succession, matrimonial property or

⁴³Zitelmann points out that the place where a wrongful act is committed may be determined differently in criminal law and in the law of torts. 2 *Op. cit.*, 479. Zitelmann himself prefers the law of the place where the muscular contraction took place. 1 *Op. cit.*, 112; 2 *op. cit.*, 480, 485.

⁴⁴30 Jhering's Jahrbücher, 100.

⁴⁵Cass. April 5, 1887, Clunet 1889, 827; Sirey, 1889, 1, 387; Bartin, Clunet 1897, 251; Reprint 29; Bustamente, Orden publico, 256; 2 Cattellani, Il diritto internazionale privato, 424; Cavaglieri, La distinzione fra atti civili e commerciali e la legge che la determina. Il Diritto Commerciale, 1910, 48-49; Despagnet & deBoeck, *op. cit.*, 355; Diena, I diritti reall, 70; Principi di diritto internazionale, 75; Sui limiti all' applicabilità del diritto straniero, 27-28; Jettel, Handbuch des internationalen Privat-und Strafrechts, 106; Jitta, Renovation of international law, 125; Koster, Internationaal burgerlijk Recht, 148; 7 Laurent, Le droit civil international, 201; Schäffner, Entwicklung des internationalen Privatrechts, 80; Surville & Arthuys, *op. cit.*, 254; Valery, *op. cit.*, 879-880. The question whether a movable is in contemplation of law annexed to some immovable in another state is deemed controlled by the law of the situs of the movable. 2 Gierke, *op. cit.*, 226; 2 Zitelmann, *op. cit.*, 131; O L G Bayern, Nov. 11, 1882, 38 Seuffert's Archiv, no. 161.

contracts.⁴⁶ Niemeyer⁴⁷ suggests, however, that such rule must yield to the law of the situs whenever the latter is mandatory. Kahn⁴⁸ insists upon the fact that if the application of the law of one state or country or that of another depends upon the character of the property as movable or immovable, the preliminary question regarding the character of such property must, for want of any other law that can control, depend upon the law of the forum.

Substance or Procedure. Anglo-American courts regard the statute of limitations as belonging to procedure. Elsewhere the question is generally deemed to affect the substance.⁴⁹ Suppose, now, that a contract is made in France, under the law of which the action is barred by the statute of limitations, and that the suit is brought in New York, under the law of which the action is not barred. Will the law governing the contract, that is French law, or the law of the forum determine the question whether the action can be maintained?

So far as the continental writers have discussed this problem they have supported the law of the forum.⁵⁰

Substance, Capacity or Form. The following cases have been much discussed in connection with the conflict of qualifications.

(1) A and B, subjects of the state of X and domiciled in such state, make in the state of Y a joint will which conforms to the law of the state of Y. Is the will valid in the state of X if the law of the state of X declares joint wills to be void? We may assume (a) that the law of the state of Y regards the matter as one of form and the law of the state of X, as one going to the substance or to capacity; (b) that the law of the state of Y regards it as one of substance or capacity and the law of the state of X as one of form.⁵¹

⁴⁶Bar, *op. cit.*, 506; Crome, Allgemeiner Teil der modernen französischen Privatrechtswissenschaft, 88 and note 55; 1 Regelsberger, Pandekten, 172; 1 Stobbe, Handbuch des deutschen Privatrechts (2d ed.), sec. 32; Venzi, Foro italiano, 1904, 1, 763; 2 Zitelmann, *op. cit.*, 131.

⁴⁷Vorschläge und Materialien zum Entwurf eines bürgerlichen Gesetzbuchs, 261.

⁴⁸Kahn, 30 Jhering's Jahrbücher, 91, 95-97. See also Baudry-Lacantinerie & Wahl, Successions, Vol. I, 654; Trib. de la Châtre, July 5, 1910, Clunet 1911, 588 and note.

⁴⁹See (1919) 28 Yale Law Journal 492.

⁵⁰Fedozzi, Il diritto processuale civile internazionale, 534-535; Kahn, 30 Jhering's Jahrbücher, 133.

⁵¹There is much controversy whether the question relates to form or substance. See Cass. Florence, Nov. 12, 1897, Monitore, 1898, 245 (substance); Cass. Rome, April 24, 1876, Giurisprudenza italiana XXVIII, 1, 708 (form); Niedner, *op. cit.*, 35 (form); 2 Zitelmann, *op. cit.*, 154 (form). Cf. Contuzzi, Il diritto ereditario internazionale, 533-538.

Is the will valid in the state of Z if both the states of X and Y regard the question as one of form, but the law of the state of Z looks upon it as one of substance or capacity?

Bartin⁵² would decide the above cases in accordance with the law of the forum. Diena⁵³ would apply the law of the forum to the cases presented in the first paragraph and the law of the states of X and Y to the case mentioned in the last paragraph.

(2) The law of X forbids its subjects to execute a holographic will irrespective of the place of execution. A, of the state of X, executes such a will in the state of Y, in which state holographic wills are permitted. Is the will valid in the state of Y? In the state of Z?

Most courts⁵⁴ and authors⁵⁵ give effect to the law of X. The French Court of Cassation,⁵⁶ the Appellate Court of Orléans,⁵⁷ Martin⁵⁸ and Diena⁵⁹ would apply the law of the forum. Buzzatti⁶⁰ and Fedozzi⁶¹ hold that the question is clearly one of form and that the will is therefore valid if it conforms to the law of the place of execution.⁶²

Rights of Surviving Widow as belonging to Law of Succession or to Law of Matrimonial Property. Under the continental law

⁵²Bartin, Clunet 1897, 236, 480, 490-491; Reprint 14, 48, 58-59.

⁵³Diena, Sui limiti, 30. Fedozzi would also support the validity of the will in this case. *Op. cit.*, 825.

⁵⁴Belgium: App. Liège, June 18, 1874, Pasicrisie 1874, 2, 301; Trib. civ. Brussels, July 21, 1886, Pandectes françaises 1887, 5, 7; Clunet 1887, 495, Feb. 10, 1892, Pasicrisie 1892, 3, 139. France: Trib. civ. Seine, Aug. 13, 1903, Clunet 1904, 166; Trib. civ. Termonde, March 24, 1907, Clunet 1908, 885. Holland: Trib. Amsterdam, July 6, 1885, Clunet 1889, 175; Feb. 15, 1901, Clunet 1903, 417; Weekblad von het Recht, no. 7624. Italy: App. Genoa, Aug. 4, 1891, Foro Italiano 1892, 1, 116; Clunet 1893, 955; Cass. Turin April 12, 1892, Clunet 1894, 1083; Monitore 1892, 346; Annali 1892, 1, 242; Foro italiano 1892, 801-802.

⁵⁵Despagnet, Clunet 1898, 267; Durand, *op. cit.*, 401-402; 1 Laurent, Principes de droit civil français, 159; 6 Laurent, Le droit civil international, 695; Renault, Revue critique de législation, 1884, 736; 2 Rolin, Principes de droit international privé, 406; Di Stefano—Napolitani, La massima "locus regit actum," 58-59; Surville & Arthuys, *op. cit.*, 20, note 277; 4 Weiss, *op. cit.*, 667.

⁵⁶Cass. Aug. 25, 1847, Dalloz 1847, 1, 273.

⁵⁷App. Orléans, Aug. 4, 1859; Dalloz 1859, 2, 158.

⁵⁸Clunet 1897, 229, 233, 236, 480; Reprint 7, 11, 14, 48.

⁵⁹Sui limiti, 26.

⁶⁰Di una nuova categoria di conflitti di leggi.—I conflitti di qualificazione (Studi giuridici varii pel cinquantésimo anno d' insegnamento di Enrico Pessina, Vol. III; Reprint, 16.

⁶¹Il digesto italiano, vol. 22, 828.

⁶²See also Colin, Clunet 1897, 937; Pillet, Clunet 1894, 722.

it is sometimes exceedingly difficult to know whether the rights of the surviving widow are given to her as a result of the matrimonial property régime or as a right of succession. Where there has been a change of domicil or nationality after the celebration of the marriage, the question whether the personal law at the time of the marriage or at the time of death will determine her rights may depend, therefore, upon this preliminary question.

The writers discussing this subject are inclined to make a distinction between the cases which are connected with the law of the forum by reason of the decedent's nationality or domicil and the cases where the law of the forum has no such connection with the subject. In the former situation Catellani⁶³ would apply the law governing the succession, and in the second, the "competent" law. Bartin⁶⁴ contends in favor of the law of the forum in both cases.

Civil or Commercial Acts. In continental countries special rules are often applicable to "commercial acts." This is true not only from the standpoint of the strictly internal law but also from that of the conflict of laws.⁶⁵ As the definition of a "commercial" act varies, the problem is whether the preliminary question as to what constitutes such act is to be determined by the strictly local law of the forum or whether the qualification of the foreign law shall be adopted.

Practically all are agreed that the *lex fori* will control with respect to the character of an act as commercial or civil if the ultimate question relates to the jurisdiction of courts.⁶⁶ Where the ultimate question involves the substantive rights of the parties some⁶⁷ would make the intention of the parties the controlling test, others⁶⁸ would apply the law of the place of contracting without

⁶³2 Catellani, *op. cit.*, 424.

⁶⁴Bartin, *Clunet* 1897, 236, 480, 726; Reprint, 14, 48, 70.

⁶⁵Italy, Art. 58, Commercial Code.

⁶⁶Bustamante, *Autarquia*, 232; 2 Catellani, *op. cit.*, 424; Cavaglieri, *Il Diritto Commerciale*, 1910, 37; Fedozzi, *Il diritto processuale civile internazionale*, 328. But see Calvo, *Le droit international* (5th ed.) 394.

⁶⁷App. Milan, July 1, 1914, *Foro italiano*, 1914, 1, 1326; *Rivista di diritto internazionale*, 1914, 610, (1919) 28 *Yale Law Journal* 806; Asser & Rivier, *op. cit.*, 187-188; Bustamante, *Autarquia*, 232; Grasso, *Principii di diritto internazionale* 279. Olivi, *Manuale di diritto internazionale* (2d ed.), 848-849; Surville & Arthuys, *op. cit.*, 641.

⁶⁸1 Diena, *Diritto commerciale internazionale*, 62; 35 *Rivista italiana per le scienze giuridiche* 1903, 364; Valery, *op. cit.*, 1251.

reference to the intention of the parties, and still others,⁶⁹ the law of the forum.

The above are the principal questions which have been considered by the continental writers in connection with the problem of qualifications. Let us consider now the theories that have been proposed for the solution of the general problem.

General Theories

Bartin. Of the various attempts to formulate a general theory for the solution of the problems above outlined Bartin's "theory of qualifications" was the first to attract general attention. This writer maintains that whenever the application of the internal law of the forum or that of another country depends upon the nature of a particular juridical relationship, it is the law of the forum which must decide what the nature of the relationship is. The reasoning by which this conclusion is reached is the following. Barton starts with the fundamental proposition that the law of the forum in authorizing the application of foreign law voluntarily restricts its own sovereignty. When the judge of the forum is directed, therefore, to apply foreign law to a particular legal institution or relationship, it is evident that the extent of the limitation upon the sovereignty of the former must be measured by the notion which the law of the forum entertains of such institution or relationship. A state cannot possibly be deemed to have entrusted the foreign law with the duty of determining which juridical relationships belong and which do not belong to the institution which the law of the forum intended to submit to the jurisdiction of the foreign law. If it did so the law of the forum would not define the extent of its obligation with reference to the foreign sovereignty as it has a right to do, for it would be the foreign law—the foreign sovereignty—that would in reality determine in such a case the extent of such obligation. By giving to the institution a wider meaning than it has under the law of the forum the foreign law would be able to extend the obligation indefinitely. The result would be that the law of the forum would no longer be master in its own home.⁷⁰

Bartin would apply the law of the forum also in the case where the juridical relationship as such had in its origin no connection

⁶⁹Cavaglieri, *Il Diritto Commerciale*, 1910, 50; 1 Lyon-Caen & Renault, *Traité de droit commercial*, (4th ed.) no. 183.

⁷⁰Clunet 1897, 236-239; Reprint 14-17.

with the law of the forum, and the foreign country or countries with which it was so connected qualify it in a different manner. He would do so without regard to the fact whether or not the qualification of one of the foreign laws agrees with the qualification of the forum. He is led to this conclusion through the following process of reasoning. The system of qualifications of the law of the forum is the necessary complement of the system of private international law which the law of the forum has adopted. Both are expressions of its idea concerning its own sovereignty and the limitation thereon which it feels bound to admit. As there is no authority other than that of the state which has power to define the sovereignty of such state and the extent to which the international community of nations limits its sovereignty and its laws enacted thereunder, each state is invested in the nature of things with the power to fix the extent itself, and in doing so it draws its inspiration necessarily not from the arbitrary counsels of comity but from the idea it entertains of sovereignty in general, including its own sovereignty. This notion of sovereignty on which this system of private international law rests together with its system of qualifications, which is the necessary complement thereto, is the expression of its conception of the requirements of international justice. It follows, therefore, that it must apply the same notion and everything depending thereon to the other states as well as to itself. When the judge has before him, therefore, two different qualifications of the same legal relationship, that is, two different expressions of sovereignty, he must naturally follow exclusively the qualification which results from his own notion of sovereignty. This notion the forum has constructed in an abstract, impersonal and disinterested manner, so that it may serve within its own territory for the purpose of separating the domain of its own law from the domain of the foreign law, as well as separating the domain of one foreign law from that of another.⁷¹

To the rule that the law of the forum must qualify all juridical relationships Bartin will recognize two exceptions: (1) With respect to the determination of a thing as movable or immovable he would apply the law of the situs, not because such law has sovereign authority over the soil but because it subserves best the security of transactions affecting property;⁷² (2) In the matter of contracts Bartin would determine the *lex loci contractus*, where

⁷¹Clunet 1897, 469-470; Reprint 37-38.

⁷²Clunet 1897, 250-253; Reprint 29-32.

the contract is made by correspondence, not with reference to the law of the forum but with reference to that law applicable to the case which would postpone its formation longest.⁷³

A number of writers agree in general with Bartin's theory.⁷⁴ Donnedieu de Vabres⁷⁵ takes issue, however, with Bartin's view that the application of foreign law by the law of the forum involves a limitation of its own sovereignty. This writer maintains that an appropriation of the foreign law that seems best to the forum constitutes an exercise of its own sovereignty and that it would be an abdication of such sovereignty if the forum should consult another qualification than its own.

Buzzatti. Originally Buzzatti agreed with Bartin only to the extent of holding that the determination of domicile and perhaps certain other points of contact must be governed by the law of the forum. As regards the other problems he felt that the cases discussed by Bartin resulted not so much from a difference in the laws of the different countries as from an erroneous interpretation and application of such laws.⁷⁶ Buzzatti has, however, modified his opinion since the time of the publication of his original article on the subject, so that his views coincide today more nearly with those expressed by Bartin.⁷⁷

Diena. Where the conflict in qualification is between the law of the forum and that of a foreign system Diena would agree with Bartin's conclusion. But where the only connection of the case with the law of the forum is the fact that suit is brought there Diena would not apply the qualification of the law of the forum whenever the foreign systems agree among themselves on the qualification of the legal transaction. In this case he would accept the common foreign qualification.⁷⁸

Kahn. Kahn dealt with most of the problems contained in this article a considerable time before Bartin advanced his theory of qualifications.⁷⁹ Under the head of "Collisions in the Point of

⁷³Clunet 1897, 476; Reprint 44.

⁷⁴The following writers agree with Bartin's general conclusion. Anzilotti, *Rivista di diritto internazionale*, 1914, 614; Cavaglieri, *Il Diritto Commerciale*, 1910, 53; Fedozzi, *Il digesto italiano*.—*Diritto internazionale*.—*Successione*, Vol. 22, 810; Venzi, *Foro italiano*, 1904, 1, 761.

⁷⁵Clunet 1905, 1234.

⁷⁶*Op. cit.*, 15-17.

⁷⁷Professor Buzzatti had the kindness so to inform the writer.

⁷⁸*Sui limiti all' applicabilità del diritto straniero*, 30.

⁷⁹Kahn's view is adopted by Regelsberger. 1 Pandekten, 165.

Contact" he included nationality, domicil, *lex loci contractus*, *lex loci solutionis*, *lex loci delicti*, and the question of movable and immovable property. The other cases in which there is a difference in the qualification of juridical relations or institutions he discussed under the heading of "Latent Conflict of Laws." With respect to both classes of problems Kahn held that the law of the forum was alone competent to define the particular institution, relationship, or legal concept.⁸⁰ He found it impossible, however, to apply this principle to the case of double nationality when the law of the forum is disinterested. In this case he would abandon the rule of nationality and substitute for it that of domicil.⁸¹

Despagnet. Despagnet has advanced the proposition that the law governing the legal relationship must control also its qualification. His argument in support of this conclusion is the following. When a judge, drawing his inspiration from his own law and the principles of private international law, decides that a foreign law should be applied to a particular juridical relationship, he must be understood as applying such law so far as it organizes and regulates such relationship. Now the first point that attracts the attention of the legislator and the first thing determined by him is the nature or qualification of the relationship which he regulates. To disregard his decision in this respect is tantamount to a non-application of the law to which the juridical relationship in question was on principle subject. If the national law has made a certain question one of capacity, can it be said that if the question is converted into one of form by the law of the forum the law which should govern the capacity of individuals has been applied? No! The very principle has been violated. What is of capital importance and what produces all subsequent juridical consequences is precisely the qualification to be given to a juridical relationship and it is a flagrant contradiction in fact to import the qualification of the forum and at the same time to pretend that one is following the foreign law. Take the classical example—Article 3, Paragraph 3, of the French Civil Code, according to which the capacity of foreigners is regulated by the national law. This article is manifestly violated if we should say that the prohibition to make a will in holographic form which exists in Holland with respect to Dutch subjects is a question of form according to the French legislation, when the national law of the Dutch subject has made of it

⁸⁰30 Jhering's Jahrbücher, 76, 91, 99.

⁸¹Ibid., 69.

a question of capacity. It seems evident that the first consequence resulting from the adoption of a law for the regulation of a certain relationship is the necessity of adopting also the nature which it attributes to it and the qualification which it gives to the relationship.⁸²

According to Despagnet, therefore, a judge must accept the qualification adopted by the foreign law, in order to apply the latter in conformity with the rules of private international law sanctioned by his own law. This view is shared on principle by several other writers.⁸³

Gemma. According to this writer the principles of the conflict of laws should not be deduced from the function of the state and of the judge, but the norms for a state and judge should be deduced on the basis of the conflict of laws. Gemma would separate the juridical relations and institutions from the positive legislations of the various states, so that their function may be considered without bias with reference to the requirements of international life. The judge should, therefore, appreciate the qualification of legal transactions solely with reference to that law which is most favorable to the development of the relationship itself in its extraterritorial aspect. According to Gemma the will of a Dutch subject executed in the holographic form in a country in which such wills are permitted should be recognized by the courts of other countries, not because the law of the forum regards the question as one of form (Bartin), nor because the national law governing in the system of the conflict of laws of the forum regards it as a question of capacity (Despagnet), but because a proper international order requires that persons abroad should be able to execute wills in as simple a form as possible and the holographic will best answer this requirement. The judge should have in mind the international principles and not those of the forum. Otherwise a real system of private international law can never be built up.⁸⁴

Jitta. This author rejects all mechanical application of the *lex fori*, the *lex domicilii*, the *lex rei sitæ*, the *lex loci contractus*, etc., and inquires always what are the reasonable requirements of international social life in the particular case. If a juridical relationship belongs to a particular local sphere he will apply the law of that sphere, including its qualification. The question whether property is movable or immovable or whether a particular indi-

⁸²Clunet 1898, 261-262. See also Despagnet & de Boeck, *op. cit.*, 357.

⁸³See 2 Catellani Il diritto internazionale privato, 426.

⁸⁴Propedeutica al diritto internazionale privato, 111-112.

vidual is a trader would be decided, therefore, in accordance with this principle by the law of the situs⁸⁵ or by the law of the place where the business was carried on. If the juridical relationship belongs to international social life, as for example, a contract having direct connection with several countries or states, the rule to be applied would be the "international-common" rule, if such can be found, and if none exists, the reasonable principles of international social life.⁸⁶ It is apparent that in a system like this the conflict of qualifications presents no special problem and coincides in all cases with the general problem of the choice of law.

English and American Law

There is scarcely any discussion of the problem of the conflict of qualifications in the decisions of the English and American courts or by the Anglo-American text writers. The general attitude of the Anglo-American law with reference to the problem appears, however, to be clear, and with reference to some lines of cases a solution is clearly established by authority.

Movable and immovable property. The law of the situs controls the question whether property or an interest therein is to be regarded as movable or immovable property. This question was clearly decided in *Johnstone v. Baker*,⁸⁷ where it was held that a Scotch heritable bond, that is a mortgage deed on Scotch realty, which was in the possession of an English testator, being regarded by Scotch law as an integral part of the realty, would be deemed real estate in England for the purpose of descent. English law was held to control as the *lex rei sitæ* and not as the *lex fori* in other cases also in which the situs of the land was in England. *Chatfield v. Berchtoldt*⁸⁸ raised the question whether a rent charge *pur outre vie* issuing out of English land, owned by a person domiciled in Hungary, was liable to legacy duty as personal estate under the English statutes, which make estates *pur outre vie* applicable as personal estate in the hands of an executor and administrator. It was assumed throughout the case that the English law as the law of the situs would determine the real or personal nature of the interest in question. In *Freke v. Lord Carbery*⁸⁹ it was

⁸⁵La méthode, 125. See also *internazional Privatrecht*, 69-71.

⁸⁶La méthode, 136.

⁸⁷(1819) 4 Madd. 474, n.

⁸⁸(1872) L. R. 7 Ch. 192.

⁸⁹(1873) L. R. 16 Eq. 461.

held that the validity of a testamentary disposition of an English leasehold was governed by the law of England as the law of the situs, and not by that of the testator's domicile. The same principle was applied to the devolution of a leasehold in case of intestate succession in *Duncan v. Lawson*.⁹⁰ In the same way, the character of a mortgage on realty as movable or immovable property has been determined by the law of the situs.⁹¹

Domicil. The English courts have been guided in the determination of domicile exclusively by English law and have paid no attention whatever to the foreign law. The attitude of the English law is well expressed by the Master of Rolls, Sir Nathaniel Lindley, in the case of *In re Martin*, in which the learned judge says:⁹²

"The domicile of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicile which are recognised in this country and are part of its law. Until the question of the domicile of the testatrix at the time of her death is determined, the Court of Probate cannot tell what law of what country has to be applied. The testatrix was a Frenchwoman, but it would be contrary to sound principle to determine her domicile at her death by the evidence of French legal experts. The preliminary question, by what law is the will to be governed, must depend in an English Court on the view that Court takes of the domicile of the testatrix when she died. If authority for these statements is wanted, it will be found in *Bremer v. Freeman*, *Doglion v. Crispin*, and *In re Trufort*. In each of the last two cases a foreign Court had determined the domicile, and the English Court had also to determine it, and did determine it to be the same as that determined by the foreign Court. But, as I understand those cases, the English Court satisfied itself as to the domicile in the English sense of the term, and did not simply adopt the foreign decisions. The course universally followed when domicile has to be decided by the Courts of this country proceeds upon the principles to which I have alluded."

The only English case suggesting a different proposition is that of *In re Johnson*.⁹³ In that case Justice Farwell expressed the opinion that an English woman could acquire no domicile in Baden, although she resided permanently in the grand-duchy because the law of Baden determined the question before the court by the law of nationality and paid no regard to that of domicile.

⁹⁰(1889) L. R. 41 Ch. D. 394.

⁹¹*Newcomer v. Orem* (1852) 2 Md. 297; *Crandell v. Barker* (1898) 8 N. Dak. 263, 78 N. W. 347; *Martin v. Stovall* (1899) 103 Tenn. 1, 52 S. W. 296; *In re Hoyles* (1910, C. A.) 27 T. L. R. 131.

⁹²(1900) P. D. 211, 227.

⁹³(1903) 1 Ch. 821.

"No change is effectual," said the learned judge, "unless the factum is proved, and the factum cannot exist in a country where the law refuses to recognize it. The result is that this court must conclude that a domicile of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicile at all, and that the propositus, therefore, is left with his domicile of origin unaffected. The Baden courts would in effect have disavowed him and disclaimed jurisdiction. This appears to me to be the logical result of the application of our rules respecting domicile and to be in accordance with justice."⁹⁴

Westlake⁹⁵ has given his approval to the above reasoning. "On the main point," he says, "the judgment, as well as the reasoning which has been quoted from it, was in accordance with the doctrine which I have advocated." Dicey⁹⁶ is of the opinion that all that Westlake probably meant to say was that the legal effects of domicile were to be determined solely with regard to the foreign law and without reference to the legal effect of domicile under the law of the forum. This thought is expressed by Westlake in another place where he says that "no one can acquire a personal law in the teeth of that law itself."⁹⁷ In other words, the English judge should not apply the foreign law if it does not want to be applied. This is in accordance with Westlake's general view concerning the application of foreign law, for Westlake supports the *renvoi* theory in the sense of the "*désistement*" or mutual disclaimer of jurisdiction theory.⁹⁸ As Farwell in the second line of reasoning in *In re Johnson* employed the *renvoi* proper reasoning which Westlake disapproves, the latter preferred to accept the learned judge's first argument.

It is obvious, however, that Farwell was in error when he assumed that the Baden law refused to recognize the *factum* of domicile. There is no doubt whatever that Miss Johnson was domiciled in Baden according to Baden law. The Baden courts would take jurisdiction and distribute the property left by her in Baden, but such distribution would be made in accordance with the rule of the conflict of laws then established in Baden, namely, the decedent's national law.

⁹⁴*Ibid.* 828.

⁹⁵Private International Law (5th ed.) 41.

⁹⁶Conflict of Laws (2d ed.), 118.

⁹⁷*Op. cit.*, 353.

⁹⁸*Op. cit.* See 10 Columbia Law Rev. 190, 327; 27 Yale Law Journal, 509; 29 *ibid.*, 214.

The decision of *In re Johnson* was followed by *In re Bowes*,⁹⁹ without any written opinion.

Relying upon the above cases Hibbert¹⁰⁰ states the following two propositions as existing English law: (1) The law of the locality in question must recognize that domicile results from the party's presence within its territory; (2) The requirements, if any, for the acquisition of a domicile, imposed by the law of the locality in which the party permanently resides must have been complied with. It is submitted, however, that there is no warrant for the conclusions just stated, for the conflict in the cases relied upon by Hibbert turns actually upon a difference in the rules of the conflict of laws and not upon a difference in the conception of domicile. So far as the case of *In re Johnson* may hold by way of implication that a domicile cannot be established in a country without a compliance with the rules of such state relating to domicile, it is contrary to the established law of England.

In the United States there are no cases containing any such suggestions regarding domicile as those found in *In re Johnson*. On the contrary, there are a number of decisions showing that a domicile may be established in another state or in a foreign country without reference to the notion of domicile in the law of such state or country.¹⁰¹ The case of *In re Colburn's Estate*¹⁰² is no exception to the rule. In that case the Supreme Court of Iowa decided in favor of an Iowa domicile, but in so doing referred to the Oklahoma "business domicile" statute. Such reference did not, however, necessarily involve the assumption that the Oklahoma law would be controlling on the issue of domicile, but rather that the statute in question while purporting to impose an Oklahoma domicile in certain cases in fact merely prescribed the devolution of local property. The cases in general show clearly that the question of domicile is to be decided by reference to the "general" or international law as incorporated into the law of the forum and not by reference to any foreign jurisdiction.

Lex loci contractus. No English or American cases have been found which have raised the question whether the *lex loci contractus* of a contract made by correspondence should be determined

⁹⁹(1906) 22 T. L. R. 711.

¹⁰⁰International Private Law, 13-14.

¹⁰¹*Harral v. Wallis* (1883) 37 N. J. Eq. 458, affirmed under name of *Harral v. Harral* (1884) 37 N. J. Eq. 279; *Dupuy v. Wurtz* (1873) 53 N. Y. 556; *In re Martin's Estate* (1916) 94 Misc. 81, 157 N. Y. Supp. 474.

¹⁰²(Iowa, 1919) 173 N. W. 35.

by the law of the forum or by the law of some other state. In the cases raising the question the foreign law was either assumed to be identical with that of the forum with respect to the place where the contract was made, or the question was held to depend upon the intention of the parties,¹⁰³ so that it was not necessary to consider the question under discussion. There would appear to be no doubt, however, that the law of the forum controls.

Capacity or form. This question was raised in *Ogden v. Ogden*.¹⁰⁴ A Frenchman, domiciled in France, married an Englishwoman in England without the consent of his parents, which consent was required by French law, though not by English law. He subsequently obtained a decree of nullity in France for want of such consent. The woman thereupon married again. On discovering the existence of the first marriage her husband sued for divorce in England on the ground of bigamy. The Court of Appeal decided in his favor on the ground that the French decision of nullity was void, being contrary to the English rules of the conflict of laws, namely, that the consent of parents is a matter of formality and subject therefore to the law of the place where the marriage was celebrated.

In view of the above cases it may be asserted that according to Anglo-American law the qualification of legal transactions as well as the definitions of "domicil," "the law of the place of contracting," and of the other "points of contact" are governed in general by the strictly internal law of the forum, the principal exception to the rule being that the character of property as movable or immovable is controlled by the law of the situs. This conclusion is also the only one that is consistent with the Anglo-American theory of the conflict of laws.

Anglo-American law agrees thus in substance with the conclusion reached by Bartin and Kahn. The point at issue between the foreign writers is nothing less than a fundamental difference in their conception of the conflict of laws. Bartin and Kahn are nationalists in their viewpoint while Despagnet and Gemma are internationalists. As the difference between these schools may be found in some of the most recent treatises on the conflict of laws in English¹⁰⁵ only a few words need be said concerning them in this place. Both nationalists and internationalists differ among

¹⁰³Hansen *v. Dixon* (1906) 23 T. L. R. 56.

¹⁰⁴(1908) P. 46.

¹⁰⁵Beale, *Conflict of Laws*, 86, *et seq.*; Baty, *Polarized Law*, 148 *et seq.*; Bar, *Private International Law*, 42 *et seq.*

themselves. A common characteristic of all internationalists is their position that the rules of the conflict of laws are dictated to the individual states, from without by some species of international law. According to them there is but a single system of the conflict of laws, the rules of which are binding for purely international reasons. The nationalists are agreed, on the other hand, that the rules of the conflict of laws form a part of the national law of each state and that there are, therefore, as many systems of the conflict of laws as there are independent states. Given this difference in their point of view it is natural that the internationalists should attempt to find some "international" solution for the problem of qualifications, and that the nationalists should be content to solve it with reference to the law of each state.

That the international theory is idealistic and not in accord with reality is obvious. International law has not furnished the existing rules of the conflict of laws; nor does it impose to-day in this respect upon the nations any far-reaching obligations. Indeed, Anglo-American writers and the nationalists in general are in the habit of asserting that international law leaves the different nations absolutely free in regard to the adoption of their rules of the conflict of laws, and that they may, if they desire, adjudicate all cases in accordance with their own rules of internal law.¹⁰⁶ This position, however, cannot be maintained, for there is a well established rule of international law which forbids a fundamental denial of justice to aliens.¹⁰⁷ We must agree also with Kahn¹⁰⁸ that no state is authorized at the present development of

¹⁰⁶"It follows from the independence of each state within its own borders that it might without contravening any principles of international law regulate every set of circumstances which calls for decision exclusively by its own law." Holland, *Jurisprudence* (10th ed.) 402. To the same effect, Story, *Conflict of Laws* (8th ed.), 25; Wheaton, *International Law* (9th ed.) 133-134; Woolsey, *International law* (6th ed.) 102-109; Baty, *op. cit.* 9; Hall, *International law* (8th ed.) 51; Lawrence, *International law* (4th ed.) 246; Twiss, *Law of Nations*, new ed., 261. The continental writers hold that the exclusion of all foreign law would be regarded today as a violation of international duty. Bluntschli, *Das moderne Völkerrecht*, 27-28; Diena, *Principi di diritto internazionale*, 23; Kahn, 40 *Jhering's Jahrbücher*, 40.

¹⁰⁷Borchard, *Diplomatic Protection of Citizens Abroad*, 13, 178, 196-199, 330 *et seq.*

¹⁰⁸40 *Jhering's Jahrbücher*, 40. Kahn is inclined to add to the above some special rules, for example, that the law of the situs controls as to property rights in immovables and that a state is not authorized to extend its rules governing domestic relations and the law of inheritance to persons temporarily within the state. These rules having been followed consistently by the great majority of states, a deviation therefrom would, according to Kahn, constitute a breach of an international legal duty. *Ibid* 41-42.

international relations to exclude the application of foreign law altogether or to act arbitrarily in the application of its rules of the conflict of laws. Suppose, for example, that the state of X should debar from local recognition all marriages except those consummated within its territory and that an American husband and wife, who had taken up their residence in the state of X, should be prosecuted for illicit relations. Or suppose that the state of X should admit alien residents and then refuse recognition to titles to personal property acquired under foreign law. Can there be any doubt, if the government of the United States should file a protest against such "outrageous" legislation for the protection of American citizens that international law would support its claim?

While the existence of external restraint cannot, therefore, be denied altogether, the fact remains nevertheless that up to the present time, barring treaty provisions and such general principles of international law as there may be which debar the local sovereign from adopting rules of conflict drastically oppressive, the national legislator or the courts of a state can adopt any rules of the conflict of laws whatever. The assertion on the part of the Anglo-American courts and of the jurists representing the nationalistic theory of the conflict of laws that the extent of the application of foreign law in a given state depends, with the above reservations, upon the consent of such states is based, therefore, upon fact.

Assuming, then, that the international theory of the conflict of laws rests almost wholly upon fiction let us consider briefly the Anglo-American theory and its relation to the problem of qualifications. Anglo-American courts and writers, following Huber's usage, frequently say that the application of foreign law rests upon "comity." Continental writers take strong exception to this viewpoint on the mistaken assumption that comity connotes arbitrary conduct and the absence of the idea of justice.¹⁰⁹ In fact it

¹⁰⁹The foreign writers of today are practically unanimous in condemning the theory of comity. See, however, Torres Campos, *Elementos de derecho internacional privado*, (4th ed.) 108; Aubry, *Clunet* 1901, 664. Bustamante says concerning comity:

"Comity is a pretext for the evasion of the consequences of a strict territorial law. After the notion of such law is denied, it would be idle to combat it, for it becomes unnecessary. But it may not be amiss to observe that in its obscure and little defined concept, interest, courtesy, and reciprocity, ideas so important for the history of law, play a part . . . The name of science cannot be given to them, nor can a practical and useful system be based upon them. They authorize simply concessions ungoverned by rule, the supposed independence of a state consisting in an adjustment of its conduct to that followed by other states, resulting

is fully recognized in England and in this country, as well as on the continent, that the application of foreign law results from the dictates of justice and from the mutual convenience of nations as understood and applied by the courts of the forum.¹¹⁰ Speaking generally, it may be said that Anglo-American law still accepts the maxims first formulated by Huber regarding the basis of the conflict of laws. These maxims are the following:¹¹¹

"(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.

"(2) All persons within the limits of a government, whether

ultimately in a real isolation between the people of the different countries, and in making of courtesy and reciprocity a system of reprisal, instead of a furtherance of juridical relations." *Tratado de derecho internacional privado*, 456. The key to the continental point of view may be found in the fact that the word "comity" on the continent is regarded as opposed to "justice." The plain truth is, of course, that our courts are guided in the application of foreign law by the same sense of duty as they are in the application of purely internal law. Concerning the subject see more fully 13 Illinois Law L. Rev. 396-401; Wigmore, *Celebration Legal Essays*, 220-225.

¹¹⁰Story says:

"It has been thought by some jurists that the term *comity* is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy as a matter of paramount moral duty. Now assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and the extent of the duty, but of the occasions on which its exercise may be justly demanded. And certainly there can be no pretence to say that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injuries to the rights or interests of the inhabitants of the latter, or when their moral character is questionable, or their provisions are impolitic or unjust.

"The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.

"There is then not only no impropriety in the use of the phrase '*comity of nations*,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is inadmissible when it is contrary to its known policy or prejudicial to its interests. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their government, unless they are repugnant to its policy or prejudicial to its interests. It is not comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of the municipal law are ascertained and guided." *Op. cit.*, 32, 33, 35.

¹¹¹"*Praelect.*" pt. 2, bk. 1, tit. 3, n. 2.

they live there permanently or temporarily, are deemed to be subjects thereof.¹¹²

"(3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects."

These maxims were approved by Story.¹¹³ Since Story the doctrine of the territoriality of laws has been regarded as the foundation upon which the Anglo-American system of the conflict of laws rests.

Holland¹¹⁴ has called attention to the fact that Anglo-American courts in reality never enforce foreign laws but rights acquired under such laws. He says that what really happens when a law seems to obtain extraterritorial effect is that "rights created and defined by foreign law obtain recognition by the domestic tribunal." Dicey¹¹⁵ and Beale accept this view and the latter¹¹⁶ asserts that the common law has worked out indigenously a theory of "vested rights."¹¹⁷

"The topic called 'Conflict of Laws,'" says Beale, "deals with the recognition and enforcement of foreign-created rights."¹¹⁸

And in regard to the law governing contracts he uses the following language:

"The question whether a contract is valid, that is, whether to the agreement of the parties the law has annexed an obligation to perform its terms, can on general principles (§ 14) be determined by no other law than that which applies to the acts, that is, by the law of the place of contracting. If the law at that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away except as a result of new acts which change it (§ 4). If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so."¹¹⁹

¹¹²The words "are to be deemed subjects thereof" are understood today as meaning "are to be deemed subject to its jurisdiction".

¹¹³*Op. cit.*, sec. 20.

¹¹⁴*Op. cit.*, 411. Cf. Kahn, 30 *Jhering's Jahrbücher* 28.

¹¹⁵*Op. cit.*, 11, 26; 6 *Law Quarterly Rev.* 10; 7 *ibid.* 114.

¹¹⁶*Op. cit.*, 105.

¹¹⁷For a criticism of the theory of vested rights see Wächter, 25 *Archiv für die civilistische Praxis*, 2 *et seq.*

¹¹⁸Summary, sec. 1.

¹¹⁹*Ibid.* sec. 90.

"If the law of the place where the parties act refuses legal validity to their acts, it is impossible to see on what principle some other law may nevertheless give their acts validity. . . .

"In all these cases the matter must, it seems, be determined theoretically by the law governing the transaction, *i. e.*, the law of the place where the parties act in making their agreement. If by that law their acts have no legal efficacy, then no other state can give them greater effect. If by the law of that state their acts created a binding obligation upon the parties, then the parties who have acted under that law must be bound by it. . . .

"This doctrine gives full scope to the territoriality of law, and enables each sovereign to regulate acts of agreement done in his own territory."¹²⁰

Beale's theory appears to be that there is a territorial law exclusively applicable to a particular group of facts which *must* prevail in determining legal consequences. Several decisions of the Supreme Court of the United States lend support to the same doctrine. In *Slater v. Mexican National R. R. Co.*,¹²¹ Mr. Justice Holmes says:

"As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction.¹²² But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which like other obligations, follows the person, and may be enforced wherever the person may be found.¹²³ But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation,¹²⁴ but equally determines its extent."¹²⁵

¹²⁰23 Harvard Law Rev., 267, 268, 271.

¹²¹(1904) 194 U. S. 120, 126, 24 Sup. Ct. 581.

¹²²*Stewart v. Baltimore & O. R. Co.* (1897) 168 U. S. 445, 18 Sup. Ct. 105.

¹²³*Stout v. Wood* (1820) 1 Blackf. (Ind.) 71; *Dennick v. Railroad Co.* (1880) 103 U. S. 11.

¹²⁴*Smith v. Condry* (1843) 42 U. S. 28.

¹²⁵See also, *Davis v. Mills* (1904) 194 U. S. 451, 24 Sup. Ct. 692; *Western Union Tel. Co. v. Brown* (1914) 234 U. S. 542, 34 Sup. Ct. 955; *Spokane Inland R. R. v. Whitley* (1915) 237 U. S. 487, 35 Sup. Ct. 655.

Notwithstanding these statements by such eminent authorities, it is submitted that while the theory that a particular territorial law is exclusively applicable to a particular set of operative facts may be established in this country as a matter of constitutional law it cannot be accepted analytically as a sound basis for the conflict of laws. Where all the operative facts occur in a single state it may be conceded that *as a matter of expediency* the rights of the parties should be determined ordinarily in accordance with the law of such state. But if the forum sees fit it may adopt another rule. Where the operative facts occur in or affect more than one state, there is much greater difficulty in selecting the governing rule. Generally speaking Anglo-American law will incorporate the law of some particular foreign state. It will select at times the law of the place where the act was done or was to be performed; at other times the law of the situs of the property and not of the place of acting; at other times still it will choose neither the law of the place of acting nor that of the situs of the property but the law of the domicil. Where a contract is entered into through an agent, it will bind the principal in accordance with the law of the place where the agent acts, although the principal was never in the latter state and he had no capacity under the law of the state in which he was domiciled and in which he appointed the agent. Sometimes a legal transaction will be sustained if it conforms to the law of one of several states.

That there is *no logical necessity* for the application of any particular rule selected by Anglo-American law is seen from the fact that different rules with respect to the same set of facts often prevail in foreign countries. Nor can our rules of the conflict of laws be explained by any theory of "territoriality," other than the general doctrine that the law of the forum selects the rules which shall control.¹²⁶ In fact, the only answer that can be given to the question why the common law has chosen a particular rule to govern in the conflict of laws or in any other branch of law is that it has seemed to the forum sound policy to do so.

That the English courts have not felt *bound* to attach the same legal consequences to the foreign operative facts, as is done by the law of the foreign state, appears clearly from *Machado v. Fontes*¹²⁷ and other English cases. In the former case the publication of a

¹²⁶See (1918) 27 Yale Law Journal 816; (1920) Yale Law Journal. The confusion caused by the use of the word "territorial" in different senses has been admirably shown by Aubry, Clunet, 1900, 694; 1901, 254, 263.

¹²⁷(1897) 2 Q. B. 231.

libel occurred in Brazil and under the law of that state such publication constituted only a penal offense and gave rise to no private action, and yet the English Court of Appeal allowed such an action. It attributed therefore to the operative facts in Brazil other legal consequences than those attached thereto by the law of Brazil. In *Pemberton v. Hughes*¹²⁸ the Court of Appeal stated that it would recognize a Florida divorce, although such divorce was null and void under the law of Florida.

When Anglo-American courts enforce a judgment from a continental country for the payment of money, they are in fact creating new rights, for in continental law a judgment entitles the party to execution, but does not constitute as it does in England and in this country a new cause of action.¹²⁹ Speaking of the enforcement of judgments in general Cook says:

"This clearly is a loose and technically erroneous way of putting the matter. What we ought to say is, that the common law of England and of each of the American states attaches to foreign judgments which comply with certain conditions the legal consequences described in our law by the term debt. The action brought in a common law jurisdiction is for the purpose of enforcing or vindicating that common law debt, not the foreign judgment. The latter is merely one of a set of operative facts which according to the principles of the common law result in a debt. Similarly, where a common law court permits an action of debt to be brought upon a chancery decree for the payment of money the common law court does not enforce the chancery decree in any way. It merely treats the latter as an operative fact which results in a common law debt, for the non-payment of which the common law court will give relief."¹³⁰

Hohfeld¹³¹ entertained the same view and made it the basis of his course on the conflict of laws both at Leland Stanford and at Yale. His position was that the courts of a sovereign state may attach any legal consequences whatever to any state of facts, including acts done in foreign countries. Cook makes in this regard the following observations:¹³²

"Aside from some existing system of positive law—constitutional, statutory, or judge-made—it seems clear that there is no inherent reason why the law of any sovereign nation—England,

¹²⁸ (1899) 1 Ch. (C. A.) 781. See also, *Ogden v. Ogden* (1908) P. 46.

¹²⁹ Imperial Court of Germany, June 30, 1886, 16 R. G. 427.

¹³⁰ 28 Yale Law Journal 71.

¹³¹ See 9 Columbia Law Rev. 496, 520.

¹³² 28 Yale Law Journal 69-70.

for example—may not, if the sovereign English Parliament or the appropriate English court so decrees, attach any legal consequences whatever to any state of facts whatever, including acts done in other countries, even by persons not citizens or residents of England. This simply amounts to saying that as a sovereign nation England may determine what legal consequences shall in England, by English courts, be held to attach to a given state of facts, if in any way the English court is presented with a case involving them. Suppose, for example, that an English statute should provide that any person whatsoever who, under the circumstances described in the statute, injured any other person anywhere in the world, should be deemed guilty of a tort and that if he ever came into England or owned any property there he should be subject to suit and damages assessed in a prescribed manner: surely the English courts would be bound to apply the statute to all cases coming within its scope. Clearly, also, they could not enforce the statute against persons committing the acts in question outside the jurisdiction so long as these persons both remained outside and had no property within the jurisdiction. To describe this situation in appropriate legal terminology must we not say that such a statute would *as a matter of substantive law* create primary rights in every person in the world to have all other persons refrain from the described conduct, and that when anyone was guilty of those acts anywhere a secondary English right to damages would arise? This right could not, of course, be enforced so long as the tortfeasor both remained outside of England and had no property there; but this is equally true where the tort is committed in England and the tortfeasor before action is brought, or even after it has been brought, leaves that jurisdiction and has no property within the same. That the law of England does not in fact attempt to go so far as in the case just put does not, then, show any inherent lack of power on the part of the English legislature or courts, but merely that they have refrained from establishing such a system for other reasons.”

As long as the Anglo-American notion of law is based upon the existence of physical force on the part of organized society,¹³³

¹³³The continental writers are very much opposed to the Anglo-American conception of law. Law to them “is the direct consciousness, however produced, of a binding rule. . . . If it is the common consciousness of the nation, we have municipal or state law, in its various branches. If it is the common consciousness of the civilized world, it may take various forms, which may all be classed as supra-national. It may regard the relations of States to one another; or it may regard the relations of individuals to one another.”

“Still, whichever of these varying schools we side with, we shall find that the content of the common consciousness which they all postulate is very meagre indeed. In fact, there is no such common sense of what is binding in private relations which have an international side.

“We must, nevertheless, remember that it is quite possible that such common consciousness might exist, and that it is at any rate held by

all legal relations, including rights, duties, privileges, no-rights, powers, liabilities, immunities and disabilities must necessarily have reference to some particular territorial law. Each organized society, by virtue of its existence as a sovereign, is obliged to define for itself what rights, duties, privileges, etc., shall attach to the operative facts which may be presented for determination to its judicial or executive agents, without directions or suggestions from the organized society within whose territory those facts may have occurred. Whether the operative facts happened wholly within its territory or partly or wholly without such territory cannot make any difference. "Rights"¹³⁴ being the correlatives of "duties" for the non-performance of which organized society will inflict disagreeable consequences upon the person owing the duties, it is impossible, of course, to recognize that a party has a legal right in a given state if there are no remedies available in such state for its enforcement.¹³⁵

the vast majority of thinkers that, if it exists, and in so far as it exists, it is, properly speaking, law—*Droit*." Baty, *op. cit.*, 150, 151.

Baty accepts von Bar's view. "Von Bar, speaking of the theory that nothing is law which does not rest upon forcible legislation, observes—'Is that not also law, which necessarily corresponds to the nature of the subject?' . . . By invoking the sense of binding obligation, which, in fact, does arise from the nature of things, he supplies Private International Law with a real foundation apart from the law of any particular State. Of course, the obligation is nascent—in my view it is grotesquely rudimentary—but it is real, and not theoretical and 'imparfait'." *Op. cit.*, 152.

¹³⁴That the term "rights" should be used in this specific sense has been convincingly shown by Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913), 23 *Yale Law Journal* 16; 26 *ibid.* 710; See also, Cook, *Hohfeld's Contributions to the Science of Law* (1919), 28 *Yale L. J.* 721; Corbin, *Legal Analysis and Terminology* (1919) 29 *Yale Law Journal* 163. Holland says: "Every right, whether moral or legal, implies the active or passive furtherance by others of the wishes of the party having the right When it will be enforced by the power of the State to which they are amenable, it is their 'legal duty.' The correlative . . . of legal right is legal duty. These pairs of correlative terms express, it will be observed, in each case, the same state of facts viewed from opposite sides." *Op. cit.*, 83.

¹³⁵Cf. Beale, *Summary*, Sec. 47: "A right having been created by the appropriate law, the recognition of its existence should follow everywhere

"A slave for the same reason must be recognized as such, even in a free state. It is true that if a slave comes into a free state he cannot be restrained by his master; not because he ceases to be a slave but because in such a state there is no right in a master to retrain a slave."

Sec. 48: "Though a foreign right must be recognized as existing, it does not follow that it will be given any legal force. Since a right can have no legal force unless it is given force by law (§ 2), and since nothing can have the force of law in a state except the law of that State (§ 11), it follows that no foreign right can be enforced unless the law of the State so provides. It depends upon the law as to the enforcement of foreign rights, that is, upon a principle of the Conflict of Laws."

But is the power of the forum to attach legal consequences to acts done in other countries not limited by international law?

"Of course some other sovereign nation may object," says Cook, "on the ground that 'international law' is being violated, or on any other grounds it chooses to assert. The United States, for example, did this successfully in the *Cutting Case*,¹³⁶ in which Mexico claimed the right to punish an American citizen for acts done in the United States. It can hardly be asserted, however, that Mexican law was not law in Mexico, *i. e.*, binding on the Mexican courts. If from the present war there emerges a real League of Nations with power to enforce its decrees, a different legal situation may result."¹³⁷

A sovereign state has, so far as its judicial or administrative agents are concerned, clearly the power to enforce any rules it pleases. Having this power to impose its will it may, of course, prescribe rules in contravention of international law.

"If the legislature of a particular country," says Lord Chief Justice Cockburn, "should think fit by express enactment to render foreigners subject to its law with reference to offences committed beyond the limits of its territory, it would be incumbent on the courts of such country to give effect to such enactment, leaving it to the state to settle the question of international law with the governments of other nations."¹³⁸

Indeed, in this country the courts are bound by the Constitution of the United States to enforce the provisions of a federal statute which conflict with the express terms of a prior treaty.¹³⁹ A discrepancy between the municipal law and the international obligation of a state may impose upon the latter a duty to indemnify the party whose rights under international law have been violated, but cannot lead to a reversal of the actual decision of the case by the courts. So far as private rights are concerned there would appear to be no exception to or qualification of the above rule. In the domain of public law¹⁴⁰ it is possible that an alien convicted

¹³⁶2 Moore, Int. Law Dig. 228.

¹³⁷28 Yale Law Journal 69, note.

¹³⁸Reg. v. Keyn, L. R. 2 Ex. D. 63, 160.

¹³⁹The Cherokee Tobacco Case (1870) 78 U. S. 616; The Head Money Cases (1884) 112 U. S. 580, 5 Sup. Ct. 247; Alvarez y Sanchez v. United States (1910) 216 U. S. 167, 30 Sup. Ct. 361.

¹⁴⁰The Selective Draft Act of May 18, 1917, under the terms of which aliens who had declared their intention to become citizens of the United States were subject to military duty, created a situation where the municipal law of the land conflicted with the rules of international law. In conformity with the precedents above cited it was held that the provi-

under a statute which violates his rights under international law may, upon the request of his government, be set free through the power of the executive branch of the government.¹⁴¹

Although each state has the power to attach different legal consequences to a particular group of operative facts it would be, of course, highly inconvenient as well as unjust if that power were exercised in every instance. In the interest of a proper administration of justice a state will, therefore, frequently attach to the operative facts occurring in a foreign state the same consequences attached thereto by the law of such state.¹⁴² The circumstances under which this will be done constitute the subject matter of the conflict of laws itself.

In the light of the above discussion it must be apparent that the statements by courts and writers that some foreign law had the *exclusive* power to "create" a particular right are, under the actual conditions under which the rules of the conflict of laws are administered, totally misleading. Such phrases must be regarded merely as convenient forms of expressing the thought that the law of the forum under the facts of the case will grant to the parties the same rights as would be granted by the courts of a particular foreign state. There is grave danger, however, that the constant repetition of such phrases may induce the belief that the application of the foreign law is imposed upon the courts of the forum from without, when in truth the forum acts in perfect

sions of the Act were binding upon the courts, even where they conflicted with the terms of a prior treaty. *Ex Parte Larrucea* (1917) 249 Fed. 981. See 28 Yale Law Journal 83. Larrucea was set free, however, by order of the President as Commander-in-Chief of our army, upon the recommendation of the State Department, which admitted that the Act was in violation of our treaty with Spain. A number of South Americans were released in like manner without any existing treaty, on the general ground that the Selective Draft Act violated with respect to them the principles of international law.

¹⁴¹The statement that international law is a part of our national law (see *The Nereide*, (1815) 13 U. S. 388; *The Scotia*, (1871) 81 U. S., 170, 187-188; *The Paquete Habana* (1899) 175 U. S. 677, 700, 20 Sup. Ct. 290, must be understood, according to Foulke, in the sense that if no rule of municipal law is applicable to the case a court of justice will presume that the state would have enacted the proper rule of international law and by not enacting it left it to be understood that the municipal common law was in accordance with the obligation imposed on the state by the provisions of international law. 19 Columbia Law Rev. 495-460.

International law, according to Foulke, regulates the conduct of states and municipal law that of individuals. It cannot be said, therefore, accurately that any rule of international law is ever a part of the municipal law. 19 Columbia Law Rev. 457-458. cf. Kaufmann, *Die Rechtskraft des internationalen Rechts*, 2.

¹⁴²Dicey, op cit., 8-10.

independence according to its own notions of what is right and proper. The statement criticized is perfectly consistent with the internationalistic theory of the conflict of laws,¹⁴³ but not with the fundamental conceptions of law entertained by the courts of England and the United States.

The problem has been discussed so far without reference to our American constitutions. The power of our legislatures and courts in the adoption of the rules of the conflict of laws is actually limited by various constitutional provisions,—especially those relating to due process of law and the full faith and credit clause. So far as these have been or may be held to recognize the theory that rights arising out of acts or transactions without a state are the product of the exclusive operation of a particular law territorially governing the place where the operative facts occur, such theory is binding, of course, on principles of constitutional law. As all constitutional limitations are, however, in reality an integral part of the law of each state, it is therefore still perfectly accurate to say, even with respect to the law of the United States, that all rights are created by the forum.

The qualification of legal transactions and the determination of domicile, *lex loci contractus*, and other points of contact upon which the application of foreign law depends, raises in view of the foregoing developments no problem of any special difficulty. If the conflict of laws of the forum says that the law of the decedent's domicile governs the distribution of his personal estate it must mean that in the estimation of the forum such rule accords best with the probable expectation of the decedent¹⁴⁴ or with the requirements of a good administration of justice, that is, with the requirements of international social life as conceived by the judge of the forum. A similar reason must underly the adoption of the *lex loci contractus* in the law of contracts, and all other rules of the conflict of laws.

In the selection of the concept of "domicil", "*lex loci contractus*" and the like the courts of the forum might follow one of three conceivable methods. (1) They might attempt to find an international concept; (2) they might accept the concept of a foreign country; (3) they might choose the concept of their own municipal law or create one more in accordance with the needs of the case. Practically only the last two methods are available, for

¹⁴³1 Brinz, Dandekten (2nd ed.) 104.

¹⁴⁴28 Yale Law Journal 814.

it is impossible with reference to any of the concepts under discussion to find one upon which the law of the different countries is agreed¹⁴⁵. As regards the second method, the courts of the forum cannot follow, of course, the concept of the foreign state, the law of which is to be applied, for the application of the foreign law is dependent upon the preliminary determination of the concept. The forum *could* select some particular foreign law for the determination of the concept, but, as in the case of *renvoi*, there is ordinarily no reason why it should prefer a foreign concept to its own. Convenience has suggested, however, that the classification of property as movable and immovable be referred to the law of its situs. Where the law of one of two foreign states is applicable under the law of the forum and the laws of the two states agree upon the qualification of the legal transaction the acceptance of the common qualification by the forum may also seem expedient¹⁴⁶. With these reservations the forum should determine the legal concepts for itself.

While the problem of qualifications is merely a phase of the general problem of the conflict of laws, so far as Anglo-American law and the nationalistic theory of the conflict of laws are concerned, it has been a source of great embarrassment to the internationalists. The internationalistic theory, which is followed by most of the Italian and French writers, proceeds on the assumption that there is but one system of the conflict of laws and that the rules thereof can be derived by a process of reasoning from some general principles which are deemed entitled to universal recognition and which must be accepted, therefore, as law¹⁴⁷. But the discovery of a general problem in the conflict of laws, such as that presented by the theory of qualifications, which does not admit of an "international" solution, proves, even from their own view-point, the unsoundness of their theory. Hence the earnest efforts on the continent to overthrow Martin's theory of qualifications or to reduce its operation to the narrowest limits¹⁴⁸. So far

¹⁴⁵See Kahn, 30 Ihering's Jahrbücher 67, 73, 98.

¹⁴⁶Concerning a similar exception with respect to *renvoi* see 10 Columbia Law Rev. 331-332; 27 Yale Law Journal 529-530.

¹⁴⁷See *Supra*, foot-note 137. Of the foreign codes the Italian has gone furthest in the adoption of the internationalistic theory. See Art. 8, Prel. Disp. Civ. Code.

¹⁴⁸It must be admitted, however, that Martin has unduly extended the application of his theory of qualifications. A number of examples cited by him do not involve a conflict of qualifications in the above sense. See Pillet, *Principes de droit international privé*, 105.

as Despagnet's attempt to overthrow Bartin's theory is concerned, it manifestly begs the entire question. The qualification of a legal transaction cannot, in the nature of things, be determined by the law governing the transaction itself, inasmuch as the problem of qualifications, as it is understood in this article and as it is generally understood by the writers, is limited to the cases where the application of the foreign law depends upon the determination of the preliminary question. Under these circumstances it is impossible, as has been shown, to decide the preliminary question by the law governing the transaction itself.

Nor will the rules suggested by Gemma resolve the difficulty. The requirements of international life are too vague to furnish a standard for the solution of the problem under consideration¹⁴⁹. The same objection may be raised also against the original theory of the conflict of laws developed by Jitta, except with respect to transactions which can be localized. So far as the question of the qualification of legal transactions is concerned, it would appear to coincide from Jitta's point of view with the general problem of the conflict of laws. Transactions not admitting of localization should be controlled, according to Jitta, by the international common rules, and in their absence, by the reasonable requirements of international social life. But these principles are not ready made, and it is difficult to see how an internationalization is possible of such concepts as "*lex loci contractus*", "capacity", "form", and the like upon which the application of foreign law is made to depend in the existing systems of the conflict of laws.¹⁵⁰ It is apparent, therefore, that the conception of the conflict of laws as *one* system which shall decide a case in the different countries in the same manner, is a Utopia which cannot be attained until there exist (1) a complete accord, not only with respect to the rules of the conflict of laws of the different countries, but also with reference to the various concepts or qualifications of legal relations upon which the application of the foreign law depends, and (2) an International Supreme Court with power to control the application of the concepts and qualifications to the facts of the case.

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¹⁴⁹Cavaglieri, *Il Diritto Commerciale*, 1910, 50; Fedozzi, *Il Digesto*, 810; Venzi, *Foro italiano*, 1904, 1, 761.

¹⁵⁰Jitta himself acknowledges that a judge cannot give to a juridical relationship very well a character opposed to that given to it by his national law. *La méthode*, 198.